

1 M2MsKABC

2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF NEW YORK
4 -----x

5 UNITED STATES OF AMERICA,

6 v.

7 20 CR 08 (RMB)

8 HICHAM KABBAJ,

9 Defendant.

10 -----x
11 New York, N.Y.
12 February 22, 2022
13 9:30 a.m.

14 Before:

15 HON. RICHARD M. BERMAN,

16 District Judge

17 APPEARANCES

18 DAMIAN WILLIAMS

19 United States Attorney for the
20 Southern District of New York

21 BY: ANDREW ROHRBACH

22 Assistant United States Attorney

23 ROTHMAN, SCHNEIDER, SOLOWAY & STERN, LLP

24 Attorney for Defendant

25 BY: DAVID STERN

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(The Court and all parties appearing telephonically)

THE COURT: We should start by confirming that we're proceeding by video conference instead of in person, and I just want to make sure that defense counsel and Mr. Kabbaj have discussed this and determined that it is appropriate to proceed by video conference instead of in person in a courtroom in the Southern District of New York.

Of course we're doing this because we're still feeling the effects of the COVID pandemic, and in order to make sure there are no further delays and the interest of justice and my own judgment, we should appear in this fashion.

Is that agreeable, first of all, to defense counsel?

MR. STERN: It is, and we discussed it and we think it is in all of our best interest.

THE COURT: Mr. Kabbaj, you discussed that with your lawyer?

THE DEFENDANT: I discussed that. I agree also.

THE COURT: OK. How about the government?

MR. ROHRBACH: Yes, your Honor, we agree.

THE COURT: In sentencing, following the Supreme Court decisions from 2006, '7 and subsequent, we know that the United States Sentencing Guidelines are no longer mandatory. Instead of mandatory sentencing guidelines, the court looks at the factors listed at 18, United States Code, Section 3553(a), which I've done before coming out on the bench as it were

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1 today. Those factors include the nature and the circumstances
2 of the offense or crime, the history and characteristics of the
3 defendant, the need for the sentence to reflect the seriousness
4 of the offense, to promote respect for the law, to provide a
5 just punishment, to afford adequate deterrence to criminal
6 conduct, to protect the public from further crimes, to provide
7 the defendant with needed educational or vocational training or
8 medical care or other correctional treatment in the most
9 effective manner.

10 In doing all that, we look at the kinds of sentences
11 that are available, we look at the kind of sentences and
12 sentencing range established under the sentencing guidelines,
13 even though, as I said before, those are no longer mandatory.
14 We look at any policy statements issued by the United States
15 Sentencing Commission that may apply. We seek to avoid
16 unwarranted sentencing disparities among similarly situated
17 defendants, and in appropriate cases, to provide for
18 restitution.

19 Mr. Kabbaj pled guilty before Magistrate Judge Aaron
20 on January 3, 2020, to wire fraud. I accepted that guilty plea
21 on or about January 27, 2020. We start always with a
22 guidelines analysis even though, as I said before, the
23 guidelines are not mandatory.

24 Here, the offense level is 24, criminal history
25 category is I, and the sentencing guidelines range is 51 to

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1 63 months of incarceration.

2 The presentence investigation reports the instant
3 offense as follows. This is a quote from the presentence
4 report. It goes as follows: In the instant offense, from
5 at least August 2015 through May 2019, the defendant, while
6 employed as a senior manager in the information technology
7 department of Rakuten, R-a-k-u-t-e-n, an international Internet
8 company, defrauded his employer. Specifically Mr. Kabbaj
9 submitted approximately 52 fraudulent invoices in the name of a
10 shell company he created, and that name is Interactive Systems
11 for fictitious IT products and services that were not provided,
12 resulting in payments amounting to approximately \$6,051,453.43,
13 which were subsequently transferred to defendant's personal
14 accounts. That's in the presentence report at page 21.

15 Defendant pled guilty pursuant to a plea agreement
16 which is dated December 12, 2019, in which there was what is
17 called a stipulated guideline range of 51 to 63 months of
18 incarceration, based on an offense level of 24 and a criminal
19 history category of I. Mr. Kabbaj also agreed to forfeit
20 \$6,051,453.43 in United States Currency and all right, title,
21 and interest in the following properties: 7229 Eden, E-d-e-n,
22 Ridgeway, Palm Beach Gardens, Florida, 33412; and 663 Lakeshore
23 Drive in Hewitt, H-e-w-i-t-t, New Jersey, 07421.

24 On January 12, 2022, I so ordered the parties'
25 stipulation and order of interlocutory sale of the Palm Beach

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1 Gardens property. Defendant further agreed to make restitution
2 in the amount of \$6 million -- also the same number as the
3 number we mentioned before?

4 MR. ROHRBACH: Yes, your Honor.

5 THE COURT: \$6,051,453.43.

6 Mr. Kabbaj is 50. He will be 51 in April. He is
7 married and has two children. He has a bachelor's degree. He
8 has one prior criminal conviction, namely attempted grand
9 larceny in the third degree.

10 According to the presentence report, Mr. Kabbaj stole
11 money from an executor of an estate which exceeded \$3,000. As
12 a result of this offense, he paid a fine, a \$1,000 fine. The
13 presentence investigation report also talks about another
14 criminal incident committed by Mr. Kabbaj.

15 According to the presentence report, the defendant at
16 an earlier age, namely 18 years of age, used another's ATM card
17 without permission for a total of \$560. Mr. Kabbaj was
18 required to pay restitution, court costs, victim witness fees,
19 and a fine. However, he failed to pay, and the case went into
20 default status and remains open in that fashion. According to
21 the presentence report, a warrant was issued for the defendant
22 in May of 2010.

23 Probation states that Mr. Kabbaj and his siblings
24 support his mother financially and with her daily needs, as she
25 suffers from several health issues, when Mr. Kabbaj's father

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1 suffered a stroke in approximately 1997 and resided in an
2 assisted living facility until his death in 2015. Mr. Kabbaj's
3 wife had undergone a double mastectomy in 2019. According to
4 the defense, her cancer has spread to her lymph nodes and
5 throughout her body.

6 The presentence report also states that Mr. Kabbaj has
7 been unemployed since 2019. He was employed by Rakuten
8 Marketing from 2015 to 2019, earning approximately \$359,000 per
9 year. Defendant's offense conduct occurred during the course
10 of his employment, as I mentioned before, with Rakuten.

11 Defendant was employed by a company called
12 Authentidate, A-u-t-h-e-n-t-i-d-a-t-e, from 2001 to 2013, as
13 a director of technical operations earning approximately
14 \$165,000 per year. Prior to that, he was employed as a systems
15 administrator earning approximately \$80,000 per year.

16 Mr. Kabbaj has unemployed between 2013 and 2015, and
17 as noted, he has been unemployed since 2019, after he had been
18 terminated from his company for committing the offense
19 described herein against his employer.

20 Submission dated February 1, 2022, defense counsel
21 requests a sentence of home incarceration and a fine. Among
22 other things, defense counsel asks the court to take into
23 consideration, among other things, the serious medical
24 condition of his wife, the defendant's obligation and
25 responsibility to take his wife to her medical appointments and

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1 care for her, his two teenage children, one of whom is 16 and
2 the other is a freshman in college. Also, the defense asks
3 that I take into consideration the COVID pandemic and
4 defendant's compliance with pretrial supervision for the past
5 two years.

6 Defense counsel argues that defendant committed the
7 offense due to the financial pressure of supporting his
8 immediate and extended family. It appears to the court that
9 the defendant's offense conduct began shortly after he began
10 his employment at Rakuten. Defense counsel has also submitted
11 letters of support from Mr. Kabbaj's family. The letters
12 describe Mr. Kabbaj as a good generous person who has supported
13 his family financially and emotionally throughout his life, and
14 the letters describe how devoted he is to his family and how
15 the defendant became the father figure for his siblings when
16 his father suffered a stroke.

17 By letter dated February 8, 2022, the government
18 requests a sentence within the stipulated guideline range of
19 51 to 63 months of incarceration. The government argues, among
20 other things -- and this is a quote from the government's
21 letter -- "The defendant's fraud scheme began just three months
22 into his employment at Rakuten. It beggars, b-e-g-g-a-r-s,
23 belief that the defendant could have had any legitimate
24 interest in working at Rakuten from the get-go. Tellingly, the
25 fake identity he used to submit the false invoices was the very

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1 same fake identity used as a reference in order to even obtain
2 the job at Rakuten, suggesting that this was a con already in
3 the making. The length of the fraud, a shocking four years,
4 lasting almost entirely of the -- consisting almost entirely of
5 the defendant's tenure at Rakuten is also indicative of
6 defendant's mindset. This was no blip. He did not make a
7 mistake once. Rather, he made the same calculated risk to
8 embezzle from his employer month after month, year after year.
9 Finally, it bears repeating that the loss amount is \$6 million
10 approximately. There can be no question about the seriousness
11 of the defendant's conduct and the need for a sentence that is
12 reflective of the nature of the crime." That's from the
13 government's letter at page three.

14 The government also argues that the defendant
15 continues to attempt to deceive. Government states, "Based
16 on documents the government obtained from Authentidate,
17 A-u-t-h-e-n-t-i-d-a-t-e, the defendant's employment there
18 terminated in November of 2014. He signed a termination
19 agreement with Authentidate which provided the defendant with a
20 one-time termination payment of over \$40,000 just days before
21 he was hired by Rakuten in May of 2015. In addition, rather
22 than closing its doors, as the defendant had claimed,
23 Authentidate continues to operate to this day after changing
24 its name to Aeon, A-e-o-n, Global Health in February 2018.
25 These misrepresentations may seem immaterial, but they are

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1 demonstrative of the fact that the defendant may not have yet
2 turned over a new leaf."

3 I have also reviewed the presentence investigation
4 report prepared on February 28, 2020, together with the
5 addendum dated March 26, 2020, and the sentencing
6 recommendation approved on March 26, 2020. They also had
7 received correspondence from defense counsel dated February 1,
8 2022, and from the government dated February 8, 2022.

9 My first question for defense counsel and for
10 Mr. Kabbaj is this: Have you had an opportunity to read and
11 discuss with each other the presentence investigation report,
12 the addendum, and the sentencing recommendation?

13 Counsel first.

14 MR. STERN: Yes. We have read together and discussed
15 all of the documents you just discussed in your remarks.

16 THE COURT: Mr. Kabbaj, is that correct, you went over
17 the presentence report and these other documents with your
18 attorney?

19 THE DEFENDANT: That's correct, with the exception of
20 the letter from the prosecution you just mentioned.

21 THE COURT: Which one was that? Was it the
22 February 8, 2022, letter?

23 THE DEFENDANT: The one that you stated that
24 Authentidate continued business under another name.

25 MR. ROHRBACH: That is the government's letter, not

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1 the probation's report.

2 THE COURT: I'm sorry.

3 MR. ROHRBACH: That's the government's letter.

4 THE COURT: And the date of that letter again?

5 MR. ROHRBACH: That was February 8, 2022.

6 THE COURT: Great.

7 Do either of you, you being defense counsel and
8 Mr. Kabbaj, have any remaining objections to the contents of
9 the presentence report, apart from what had previously you may
10 have brought to the attention of probation?

11 MR. STERN: Nothing that wasn't addressed in our
12 submission.

13 THE COURT: Mr. Kabbaj, any further objections?

14 THE DEFENDANT: No, sir.

15 THE COURT: Then I will return the presentence report
16 to the probation department, which is our practice. I'm happy
17 at this time to hear from defense counsel, from Mr. Kabbaj, and
18 from government counsel.

19 MR. STERN: Judge, while I stand by all that we wrote,
20 I'm not going to rematch it all. You obviously have read it
21 very carefully. No point in my repeating what you already
22 read. But what I do want to talk to you about is a decision
23 Mr. Kabbaj and I have made together to ask for a sentence other
24 than the one we asked for in our letter.

25 As you noted, we asked for the sentence because of the

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1 necessity of him caring for his wife, who I think is slowly
2 dying. We would ask you to craft a sentence, sentence him to
3 home confinement and four years of weekends in jail. I know
4 that is an unusual sentence in light of what the guidelines
5 are. I think there is good reasons for it, but I want to talk
6 to you briefly about what it means to do weekends in jail.

7 I know you know generally what that means. I have had
8 clients do it before, and it is not an easy sentence. Every
9 week you have to say good-bye to your family again. Every week
10 you have to have the jarring experience of going from what I'll
11 term regular life into a life in jail. And once you're there,
12 there is tremendous pressure on you from other inmates to
13 engage in criminal acts. So people say to you, you should
14 bring drugs in, you should bring a SIM card, you should do all
15 these kinds of things. It takes real fortitude to resist that.

16 I say all of those things because I don't want it to
17 appear that the sentence we're asking for is some kind of walk
18 in the park. It is really not. It's a serious sentence and
19 one that I think is just, reflects the seriousness of the case,
20 and takes into account all of the other issues that Mr. Kabbaj
21 has to deal with, particularly his children and his wife.

22 I think it is fair to say that he has been shaken by
23 this whole experience. I don't mean by that to disagree with
24 anything you or the government have said. He committed a
25 serious crime. He knows he committed a serious crime. He just

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1 straight up stole money from his employer, and there is no good
2 excuse for that. But I think the kind of sentence we're
3 seeking will do what is best for society, allow his wife to be
4 taken care of, and his children to be taken care of, and will
5 still punish him in a very serious way.

6 Other than that, I have nothing to add to what we have
7 written before, and I thank you for listening to me.

8 THE COURT: Mr. Kabbaj.

9 THE DEFENDANT: Yes, sir.

10 THE COURT: If you wish to be heard.

11 THE DEFENDANT: Is it OK if I read a statement I have?

12 THE COURT: Sure.

13 THE DEFENDANT: I don't have it memorized.

14 I have always tried to be a good family member, son,
15 brother, father, husband. My entire life, I had to help out
16 with my family expenses starting from my first job at 13 years
17 old in a deli. After my father's stroke, the financial
18 responsibility from my mom and helping my younger sister fell
19 upon me. Not just that, but also helping my uncle in Canada
20 with rent and my uncle in Morocco with monthly food expenses.
21 My grandmother made we promise to always help them after I got
22 married.

23 (Reporter interruption)

24 THE COURT: The court reporter wants to make sure that
25 she hears what you say so she can record it.

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1 THE DEFENDANT: My grandmother made me promise to
2 always help them and be there for them the last time I was with
3 her. After I got married in 2001, my wife moved to the United
4 States, and it was my responsibility to provide her family with
5 financial assistance, whether it was helping my mom with
6 household chores or working for extra money, as I grew up
7 helping my family members with whatever they needed, my entire
8 life was always helping others.

9 Through some stupid and arrogant actions, I got myself
10 into a situation after my father died where I thought I found
11 an easy way to take money from my employer. I'm not excusing
12 what I did, just stating factually that I did something
13 extremely stupid that has ruined my career in a field that I
14 learned the ground up, and I will probably never work in again.

15 I have learned that my actions devastated employees
16 that reported to me. I apologize to them and the entire
17 Rakuten organization. I have devastated my mother, sisters,
18 nieces, and brother-in-law and all extended family. I have
19 devastated my wife, daughter, and son. I know that nothing
20 like this will ever happen again, and I know that I will spend
21 every waking minute of my life thinking about what I did and
22 everyone I've hurt with my actions.

23 My son was diagnosed with an arachnoid cyst in his
24 skull when he was three years old. This is a cyst filled with
25 spinal fluid that does not pop when the skull is performing.

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1 My son is now 16 years old, and arachnoid causes massive
2 migraine headaches, personality changes. As the brain grows,
3 the cyst is pushing against the brain, causing other issues.

4 In July 2019, my wife underwent a double mastectomy
5 with lymph node removal. After the mastectomy, she was
6 supposed to undergo chemotherapy and radiation. I lost my job
7 due to my actions and we lost our insurance. My wife's
8 chemotherapy and radiation were postponed until April 2020,
9 during the beginning of the COVID pandemic. My actions
10 resulted in her not being able to receive the care she needed
11 in the time she needed it. Since then, the cancer has spread
12 and has metastasized. She has undergone and continues to
13 undergo treatments that are recommended, but the doctors have
14 not been able to give hope that these treatments will really
15 help.

16 Hopefully, with the pandemic winding down, hospitals
17 and treatment centers can focus 100 percent back on their
18 patients. Our days are either spent at doctor appointments or
19 helping her around the house, driving my son to school and
20 after-school activities. My daughter is a freshman at SUNY
21 Binghamton.

22 I had a bad case of COVID, and that has resulted in
23 what I call brain fog. I used to be able --

24 THE COURT: What you call what?

25 THE DEFENDANT: Brain fog. I used to be able to keep

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1 track of over 100 employees and dozens of projects, and now, at
2 times, I can't remember where the cups are, and 45 minutes
3 later I do remember. I also used to be in OK shape for a
4 50-year-old male, and now a flight of stairs has me winded.
5 Since I do not have insurance, it has been very difficult for
6 me to get the medical help I need.

7 What I have done has punished my family greatly. I
8 haven't gone over how much my mother has aged these last two
9 years. My niece is not sleeping, and my daughter has panic
10 attacks. Whatever sentence I receive, I deserve it. Me, I
11 deserve it. My family, they need me now more than ever. It is
12 a catch-22. I did something, but I deserve to be punished for,
13 that has made me even more indispensable to my family.

14 I apologize to this court, I apologize to Rakuten, I
15 apologize to my family, and I can only ask that you take my
16 family into consideration. I'm sorry, your Honor.

17 Thank you.

18 THE COURT: Government counsel, did you wish to add
19 anything?

20 MR. ROHRBACH: Thank you.

21 Your Honor, like Mr. Stern, I know that the court has
22 reviewed the submissions very carefully. I won't repeat
23 arguments about the seriousness of the offense here. I do want
24 to make one small correction and then one point.

25 The small correction is, as the court read it, the

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1 government's understanding is that Mr. Kabbaj's settlement with
2 Authentidate was closer to \$35,000. The court read our
3 submission said it was over \$40,000.

4 The point that I would like to make is really
5 something that has been conveyed to the government from
6 Rakuten, and it's the government's effort to make sure that the
7 victim is reasonably heard in these proceedings.

8 Rakuten informed the government that in addition to
9 the financial cost, there was a significant human cost to the
10 defendant's conduct. Rakuten is a vivid corporation, but
11 Mr. Kabbaj worked with colleagues, he had supervisors, he
12 himself supervised other employees who were his direct reports.
13 The people he worked with trusted him and the people who
14 reported to him looked up to him. The crime that the defendant
15 committed was a real betrayal of that trust, and the victim
16 here asked me to convey to the court and make sure that the
17 court considered that that betrayal had a human impact on many
18 employees who worked there and has taken people who worked
19 there time and effort to rebuild their trust in each other and
20 to resume their ability to work together as a team. That human
21 impact should be considered at the sentencing as well as the
22 remaining facts in the government's submission.

23 THE COURT: Thank you.

24 I'm going to adopt the findings of fact in the
25 presentence investigation report, unless defense counsel has

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1 any further objections?

2 MR. STERN: We do not.

3 THE COURT: Mr. Kabbaj, any further objections from
4 you?

5 THE DEFENDANT: No, your Honor.

6 THE COURT: How about the government?

7 MR. ROHRBACH: No, your Honor.

8 THE COURT: I will stand corrected. The number is
9 about 35,000, as opposed to \$40,000, as you pointed out.

10 I'm going to preview the sentence briefly and then
11 impose it. First of all, I have to say that I consider this to
12 be a very serious crime. Certainly, approaching \$6 million in
13 value, so to speak, which is serious enough. But it seems, as
14 I said before, and no one seems to have challenged that, that
15 the fraud began almost immediately upon new employment, and new
16 employment that I don't know if that was his initial
17 compensation. But as you know, I mentioned the amount of
18 \$349,000 a year that he was earning lawfully. That's a pretty
19 staggering amount. Pretty significant amount by any means,
20 certainly in comparison to almost every defendant that comes
21 before me and the federal courts in these kinds of cases.

22 THE DEFENDANT: Your Honor, can I say something?

23 THE COURT: Yes.

24 THE DEFENDANT: I apologize. I started there at
25 150,000, and I started there after my father passed away in

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1 July. Just so you know, since no one asked. It started in
2 August.

3 THE COURT: OK.

4 THE DEFENDANT: I apologize.

5 THE COURT: Yes. Did you earn \$349,000 ever at
6 Rakuten?

7 THE DEFENDANT: That was at the end. I was promoted
8 four or five times during the three and a half years I was
9 there.

10 THE COURT: That kind of is my point.

11 THE DEFENDANT: I apologize.

12 THE COURT: So it was a very sophisticated and
13 lucrative, remunerative position at a very substantial company,
14 which in the midst of the fraud, finds you being promoted up to
15 \$349,000. Again, first of all, this just makes it very serious
16 to me and juxtaposed among all the other defendants that come
17 before this court, that if they had that kind of opportunity, I
18 doubt that many or most or nearly all of them, but this is
19 speculation, would ever be engaged in crime, criminal conduct.
20 Meaning many of those people, I'm not trying to excuse them,
21 all these disparate crimes that I'm thinking of, but at least
22 one understands the rationale for the criminal conduct.

23 Here, it escapes me. I mean, sure, you know, there
24 are family issues and family responsibilities and family
25 illnesses, all of that, but they don't begin to impact or

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1 justify, certainly. They don't, couldn't passively justify
2 this fairly breathtaking theft of Rakuten's resources. I still
3 don't understand it, frankly, having heard both Mr. Kabbaj and
4 defense counsel and the government.

5 So, for that reason, because I do think it is so
6 serious and because I don't want there to be any disparities or
7 unwarranted disparities among other defendants either in like
8 crimes or others, and I think that the just punishment -- and
9 I'll go into these reasons a little bit more as we go along --
10 I'm going to impose a guideline sentence of 52 months of
11 incarceration. The offense level is 24 and the criminal
12 history category is I and the guideline range is 51 to
13 63 months.

14 That term of incarceration will be followed by three
15 years of supervised release with these conditions attached:

16 One, that the defendant not commit another federal,
17 state, or local crime;

18 Two, that the defendant shall not illegally possess a
19 controlled substance;

20 Three, that the defendant shall refrain from any
21 unlawful use of a controlled substance. He'll be required to
22 submit to one drug test within 15 days of placement on
23 supervision, and at least two unscheduled drug tests
24 thereafter, as may be directed by the probation officer.

25 In addition, Mr. Kabbaj shall comply with what are

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1 called the standard conditions. These are numbered 1 through
2 12 and found at pages 23 and 24 of the presentence report.
3 They include, among other things, that he must not on his own
4 possess or have access to a firearm, ammunition, destructive
5 device or dangerous weapon, anything that was designed or was
6 modified for the specific purpose of causing bodily injury or
7 death to another person.

8 Plus, the following special conditions, which I'll
9 enumerate in a moment and which incidentally the court finds
10 are reasonably related to the factors set forth in Section
11 3553(a)(1), (A)(2)(b), (a)(2)(C), and (a)(2)(D), and which I
12 also find involve no greater deprivation of liberty and is
13 reasonably necessary for the purposes set forth in sections
14 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D), and are consistent
15 also with pertinent policy statements issued by the United
16 States Sentencing Commission pursuant to 28, United States
17 Code, Section 994(a).

18 Mr. Kabbaj shall be supervised in his district of
19 residence. He is required to report to the probation
20 department within 48 hours of release from custody. Throughout
21 the term of his supervision, he is required to participate in
22 weekly therapeutic counseling by a licensed therapist. He may
23 be required to contribute to the cost of services rendered as
24 by a copayment with an amount to be determined by the probation
25 officer based on such factors as ability to pay or availability

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1 of third-party payment.

2 In addition, he is required to provide the probation
3 department and the probation officer with access to any
4 requested financial information in order to ensure compliance
5 with the financial penalties imposed here.

6 He is forbidden, that is to say, he must not incur
7 new credit card changes, new credit charges rather, or open any
8 additional lines of credit without approval of the probation
9 officer. In such a case, he must also be in compliance with
10 the installment payment schedule.

11 I intend not to impose a fine. None is recommended by
12 the probation department. Restitution is imposed in the amount
13 of \$6,051,453.43, payable to the Southern District of New York
14 Clerk of Court at 500 Pearl Street, New York, New York 10007.
15 The Clerk of Court will forward any restitution payments to
16 Rakuten.

17 If I could ask the government counsel, if you have it
18 now or if you would, submit the address for these payments to
19 Rakuten.

20 MR. ROHRBACH: I'll be willing to submit that
21 information, your Honor.

22 THE COURT: Thank you.

23 During the term of incarceration, this is how the
24 restitution shall be paid. If Mr. Kabbaj is engaged in a BOP
25 non-UNICOR work program, he is required to pay \$25 per quarter

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1 toward the criminal financial penalties. However, if he is
2 participating in the BOP's UNICOR program as a grade one
3 through four, he is required to pay 50 percent of his monthly
4 UNICOR earnings toward the criminal financial penalties,
5 consistent with BOP regulations at 28 CFR Section 545.11.

6 If any portion of the financial penalties remains
7 unpaid at the time of defendant's release from incarceration,
8 the remainder shall be paid during the term of supervised
9 release in equal monthly installments.

10 I have considered the factors set forth at 18, United
11 States Code, Section 3663(a)(1)(B)(i), or 18, United States
12 Code, Section 3664, in imposing this restitution requirement
13 and the schedule. Among other things, I have considered the
14 amount of the loss sustained by the Rakuten company as a result
15 of the offense, the financial resources of the defendant, the
16 financial needs and earning ability of the defendant and the
17 defendant's dependents, and such other factors as the court
18 deems appropriate.

19 I also intend to impose a \$100 special assessment,
20 which is mandatory pursuant to 18, United States Code,
21 Section 3013.

22 Briefly, the reasons for the sentence to be imposed
23 are these. The offense level is 24, the criminal history
24 category is I, the sentencing guideline range is 51 to
25 63 months. And I believe that this sentence is appropriate

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1 given, among other things, the seriousness of the offense and
2 the need for punishment certainly.

3 In terms of deterrence, I think it would have a
4 deterrent effect certainly upon Mr. Kabbaj, although I don't
5 know if that is necessary, and it may also have a general
6 deterrent effect.

7 But mostly, I have considered the nature and the
8 circumstances of this very serious offense, as well as
9 Mr. Kabbaj's history and characteristics. I intend to impose
10 this sentence in order to reflect the seriousness of the
11 offense, to promote respect for the law, to provide a just
12 punishment, to hopefully afford deterrence to criminal conduct,
13 certainly to protect the public from further crimes of the
14 defendant, and to provide needed educational or vocational
15 training, medical care, or other correctional treatment in the
16 most effective manner.

17 Here, I am principally referring to the need for
18 mental health treatment. I think that would be very beneficial
19 and, perhaps, would shed some light on why this serious
20 offense, in fact, has been committed.

21 If defense counsel wishes to add anything, this is a
22 good time. I'll ask the same of Mr. Kabbaj and the same of the
23 government before I actually impose the sentence, starting with
24 Mr. Rothman.

25 MR. STERN: It probably says Rothman. I'm using my

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1 partner's desk. I couldn't do it on my computer for some
2 reason.

3 THE COURT: Thank you.

4 MR. STERN: I have three things, not really editions,
5 but I pose requests. I assume I'll be corrected if I'm wrong
6 that the sale of the Florida property will be credited towards
7 his restitution requirement, because I think that that was one
8 of the ways in which the money was spent.

9 Mr. Rohrbach, am I right or wrong about that?

10 MR. ROHRBACH: So the sale of Mr. Kabbaj's Florida
11 property will be credited against his forfeiture amount, and
12 then whether the forfeiture money is used to credit against his
13 restitution amount is something that will be decided by the
14 Justice Department in Washington, DC, to which I have no
15 visibility.

16 THE COURT: I think the answer, Mr. Stern, is that it
17 is not a sure thing what you're saying, and it is not something
18 that I can direct the process. And the agreement which I've so
19 ordered is a forfeiture agreement, and it is true that the
20 proceeds from that sale are credited to forfeiture.

21 MR. STERN: OK. Secondly, I'm asking your Honor to
22 let Mr. Kabbaj self-surrender, that is, to be notified of the
23 facility he is supposed to go to and go himself.

24 Finally, I would ask that he be sent to a facility
25 close to his home. I think, although I could be wrong, the two

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1 closest are Fort Dix and Otisville, and he be sent to either of
2 those. That would be some way of having some mercy on his
3 family.

4 THE COURT: I will grant both of those two requests,
5 mainly self-surrender, and I'll give you a date in a moment.

6 I'll recommend that it be near where, I guess, his
7 residence is. Counsel is saying that Fort Dix and/or Otisville
8 appear to meet that requirement.

9 Mr. Kabbaj?

10 THE DEFENDANT: I have nothing to say, your Honor.

11 THE COURT: Anything further from the government?

12 MR. ROHRBACH: I may have misheard it, your Honor, or
13 not heard your Honor mention forfeiture. I just wanted, just
14 so the record is clear, that the court's prior forfeiture
15 orders are part of the court's sentence as well?

16 THE COURT: Yes. I thought I had mentioned it, but if
17 I didn't...

18 MR. ROHRBACH: I may just not have heard it, your
19 Honor.

20 THE COURT: You're absolutely right. I think I
21 mentioned also, but I had so ordered that order of forfeiture.
22 It is part of this sentencing for certain.

23 MR. ROHRBACH: Thank you.

24 THE COURT: Here is the sentence I will impose. The
25 guideline range is 51 to 63 months. Having considered the

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1 Sentencing Reform Act of 1984, the sentencing guidelines, and
2 the factors at 18, United States Code, Section 3553(a), it is
3 my judgment that the defendant, Hicham, H-i-c-h-a-m, Kabbaj, is
4 hereby committed to the custody of the Bureau of Prisons to be
5 imprisoned for a term of 52 months of incarceration. I will
6 set a surrender date.

7 Christine, could you suggest a date right now,
8 actually?

9 THE DEPUTY CLERK: Yes, Judge. How is April 26,
10 before 2:00 p.m., at the institution?

11 THE COURT: That's fine.

12 April 26 by 2:00 p.m. at the institution designated by
13 the Bureau of Prisons. The court will recommend that he be
14 housed at Fort Dix or Otisville so that he can be close to his
15 family.

16 You know, counsel, I know you do, that that is a
17 recommendation which I'm happy to make. It is up to, though,
18 the Bureau of Prisons as to where they will designate
19 Mr. Kabbaj.

20 MR. STERN: I do know it is not binding on the Bureau
21 of Prisons.

22 THE COURT: OK. Followed by the term of incarceration
23 of 52 months is followed by supervised release for three years
24 subject to the mandatory, the standard, and the special
25 conditions that I outlined before, and I incorporate that

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1 discussion here by reference with respect to those conditions
2 which attach to supervised release.

3 I did not impose a fine. I am imposing restitution
4 in the amount of \$6,051,453.43, payable to the Southern
5 District of New York clerk, and that information, including the
6 payment schedule which I mentioned before, is incorporated here
7 by reference. I'm also including forfeiture which is the
8 subject of an order, written order in this matter, as part of
9 this sentence.

10 I'm also imposing a \$100 special assessment, which is
11 due immediately. And as to the reasons for the sentence, I
12 have sentenced within the guideline range, and I believe this
13 sentence is appropriate for all of those reasons that I
14 mentioned before, and I incorporate that discussion here by
15 reference.

16 Does either counsel know of any legal reason why this
17 sentence should not be imposed as so stated starting with
18 defense counsel?

19 MR. STERN: I know of no such reason.

20 THE COURT: How about the government?

21 MR. ROHRBACH: No, your Honor.

22 THE COURT: I hereby order the sentence to be imposed
23 as so stated.

24 Mr. Kabbaj, to the extent that you have not already
25 waived your appeal rights, now I'm talking of course about the

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1 plea agreement dated December 12, 2019, which by the way
2 includes waivers of several appeal rights, that plea agreement
3 says that you agreed not to file a direct appeal. You also
4 agreed not to bring a collateral challenge, including but not
5 limited to any application under 28, United States Code,
6 Sections 2255 or 2241, of any sentence that's within or below
7 the stipulated guideline range of 51 to 63 months of
8 imprisonment. Of course this sentence is within that
9 stipulated guideline range, and so those waivers of the right
10 to appeal or challenge apply here.

11 But to the extent that there are any other rights that
12 I'm not aware of, I'll notify you that you would have the right
13 to appeal based on those rights. If you are unable to pay the
14 cost of an appeal, you would have the right to apply for leave
15 to appeal *in forma pauperis*. If you request, the Clerk of
16 Court would prepare and file a notice of appeal on your behalf
17 immediately.

18 Mr. Kabbaj, do you understand the waivers of your
19 right to appeal that I have mentioned to you and that are set
20 forth in the plea agreement?

21 THE DEFENDANT: I understand.

22 THE COURT: Are there any open counts the government
23 wished to resolve at this time?

24 MR. ROHRBACH: Yes, there are, your Honor, and the
25 government moves to dismiss all open counts.

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1 THE COURT: I'll grant that application.

2 And then starting with defense counsel, did you wish
3 to add anything to today's sentencing proceeding?

4 MR. STERN: The only thing I wish to add, your Honor,
5 I'm not seeking a ruling from you, is that if Mr. Kabbaj's wife
6 is having a crisis as the time of his sentence approaches, I
7 may write you a letter seeking an extension to his time to
8 surrender. I don't mean to suggest that will happen. I hope
9 it doesn't happen, but should it happen, I'll write you a
10 letter close to that time.

11 THE COURT: OK. Let's see. I think that's it for
12 today.

13 I wish you, Mr. Kabbaj, the best of luck going
14 forward.

15 Thanks, folks. We're adjourned for today.

16 MR. STERN: Thank you, your Honor.

17 MR. ROHRBACH: Thank you, your Honor.

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